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No. 85-34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

REX C. CAUBLE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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The Solicitor General's Brief in Opposition ("Br. in Opp.") urges this Court to deny certiorari in this important criminal prosecution principally on the ground that there are underlying factual issues that have been decided in the government's favor by the two courts below. Br. in Opp. 8. Our initial point, however, is that the court of appeals' decision is entitled to no weight whatsoever because its standard of review was plainly in error — that

rather than making the independent determination that this Court directed very recently in *United States v. Bagley*, 105 S.Ct. 3375 (1985), the Fifth Circuit abdicated its responsibility and affirmed the decision of the district court because it found no "abuse of discretion" and it could not conclude that the trial court's decision was "clearly erroneous." *See* Pet. 13-17.

This Court held in *Bagley* that the appellate court had the obligation to determine *independently* "whether there is a reasonable probability that" evidence not disclosed by the prosecution would have produced a different result in the trial. 105 S.Ct. at 3385 (plurality opinion).[1] The Solicitor General's Brief in Opposition demonstrates that the government, in its capacity of prosecutor, refuses to acquiesce in this square and deliberate holding. Instead, the Solicitor General cites *United States v. Johnson*, 327 U.S. 106, 111 (1946) — a decision that did not involve constitutional errors such as suppression or nondisclosure of evidence favorable to the defense — in support of the proposition that a district court's rejection of a motion for a new trial on grounds of suppressed evidence must be affirmed by an appellate court "unless 'wholly unsupported by evidence.' " Br. in Opp. 13.

It appears, therefore, that if certiorari is denied in this case, federal prosecutors will apply the erroneous proposition of law now put forward by the Solicitor General — that appellate courts must routinely affirm denials of motions for a new trial where favorable evidence has been withheld so long as there is *any* evidence to support the conclusion of the district court. If this Court wants to

1. Justice Blackmun's opinion in *Bagley* noted in a footnote that in *Napue v. Illinois*, 360 U.S. 264 (1959), the Supreme Court was not bound by the state court's decision concerning the likelihood that certain suppressed evidence would have affected the verdict. "The Court conducted its own independent examination of the record . . . . " 105 S.Ct. at 3382, n.8 (1985). On the basis of this "independent examination," it reversed the judgment of conviction.

avoid years of misapplication of *Bagley* by federal prosecutors and dozens of cases in which unjust results may be sustained because of such misapplications, it should grant the writ of certiorari and, at the very least, direct the court of appeals now to review the district court's conclusion by the correct *Bagley* standard.[2]

We turn now to a detailed response to the Solicitor General's particular answers to our claim that relevant and persuasive evidence was knowingly withheld from the defense. In each of three instances, the Solicitor General's Brief in Opposition has either misstated our contention or erroneously described the relevant portion of the record.

1. The FBI Agent's False Or Misleading Testimony.

Contrary to the Solicitor General's assertion, the court of appeals did *not* rule that Agent Masterson's testimony was truthful. The court of appeals carefully refrained from making *any* factual finding on the truth or falsity of Masterson's testimony. It stated only that it was "certainly not convinced that, taken in context, Masterson made an intentionally false statement; indeed, it is arguable whether the testimony was false or

2. The precedents cited by the Solicitor General in support of his argument that the "two-court rule" applies to this case are all inapposite. In *United States v. Ceccoloni*, 435 U.S. 268 (1978), this Court declined to "disturb" the conclusion of two lower courts that challenged evidence would not inevitably have been discovered partly because "the Government has not sought review" of that determination. 435 U.S. at 273. This Court did, however, review and reverse the other finding of the court of appeals that there was insufficient "attenuation" between an illegal search and challenged testimony to permit the testimony's use at trial. 435 U.S. at 273-279. The "attenuation" question is comparable to the "reasonable-probability-of-a-different-result" question that is at issue here. And in *Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980), the petitioner did *not* contend that the court of appeals had applied an erroneous standard of review. He simply sought to reverse evidentiary conclusions that had been fully reviewed.

simply ambiguous." Pet. App. A-5. The court of appeals rested its holding on two alternative grounds: the alleged non-materiality of Masterson's testimony and the defendant's alleged lack of due diligence.

The court of appeals could not, in fact, make any finding on the truth of Masterson's testimony because during the evidentiary hearing on petitioner's new trial motion, the district judge prohibited the taking of any testimony on this issue. *See* Pet. 10-11.[3] The court of appeals knew that there was no basis in the record for the district court's unexplained "finding" that "Masterson did not testify falsely as to the January 1978 Western State Bank special account overdrafts." Pet. App. A-35.

The Solicitor General's Brief in Opposition is self-contradictory in its discussion of the Masterson testimony. The Court is first advised that "the record amply demonstrates that his testimony was not false; rather, at most, it was simply capable of being misunderstood." Br. in Opp. 8-9. In a lengthy footnote, the Solicitor General characterizes petitioner's claim as based "on the ground that the *first* deposits to offset the January deficit came from a mid-January transfer of money from another Cauble account and from the sale of a certificate." Br. in Opp. 9, n.2 (emphasis added). But the record is clear that the "January deficit" was *completely* liquidated by checks and a bank transfer. The Solicitor General's own quotation of Masterson's testimony demonstrates that Masterson testified falsely that the deposit was "compensated for by [s]ubsequent cash deposits . . . [f]rom the sale of cattle, winnings in Las Vegas, and loan repayments (Tr. 622)." *See* Br. in Opp. 9, n.2. This testimony

3. The Solicitor General simply ignores this point in his brief. He takes petitioner to task for "petitioner's complete failure to demonstrate *intentional* use of *known* false testimony . . . ." Br. in Opp. 11, n.5 (emphasis added). By foreclosing all testimony on this issue, however, the district court prevented petitioner's counsel from making any record on Masterson's testimony or on the prosecutor's motives.

is not simply "ambiguous" or "capable of being misunderstood." Stripped of euphemisms, it is blatantly false.[4]

On the question of "due diligence," the Solicitor General declines to respond to our argument (Br. in Opp. 11, n. 5), and simply ignores our discussion of the conflicting case law from three circuits. Pet. 17-18. The Solicitor General cites only one reported "due diligence" decision that purportedly supports his position — another ruling by the Fifth Circuit. *United States v. Metz*, 652 F.2d 478, 479 (5th Cir. 1981). But *Metz* did not involve any *Napue* or *Brady* claim, and it therefore provides no support for the government's position.

The Solicitor General also takes petitioner to task for giving Masterson's testimony an "interpretation that is inconsistent with the government's theory of the case." Br. in Opp. 9. But rather than "interpret" the prosecutor's position, we quoted, at length, pertinent portions of the prosecutor's opening and closing statements to the jury. Pet. 6-7. It was clear from these passages that the prosecutor sought to convince the jury that all *three* events — the bank account deficit, the arrival of a boat-load of drugs, and the influx of cash into Cauble Enterprises — coincided. This was dramatic proof of motive, confirmed to the jury when it reheard Masterson's testimony just prior to the verdict. Pet. 7-8. The Solicitor General's attempt now to rework the record

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4. The Court is also advised that the prosecutor "later clarified" this "ambiguity" in his questioning of petitioner. Neither court below relied on this argument, and it is contradicted by the record. During petitioner's cross-examination, the prosecutor suggested that the overdraft was compensated for by "sale of a CD that paid to cover that" and a transfer of $50,000 from "the employees' benefit account from [one of the western wear stores]." Tr. 2116-17. Petitioner denied the second assertion, and was not asked again about the alleged CD. The jury could not have understood this exchange as a correction of Masterson's false testimony, which was read to the jury shortly before its verdict. Pet. 5-7.

to diminish the materiality of this testimony merely demonstrates the importance of the direction to lower courts in *Bagley* to apply the materiality standard with sensitivity to the problems of "reconstructing" after the trial what might have happened during trial if there had been no constitutional violation. 105 S.Ct. at 3384.

2. The Prosecutor's Procedural Concession To The Former Wife of His Principal Witness.

Our Petition stated that "the defense was not told that Hawkins had bargained for immunity for his ex-wife and had been given an assurance that she would be given an opportunity to cooperate before she was prosecuted." Pet. 8-9.[5] The district court found (Pet. App. A-29):

> Government prosecutor David Baugh promised Hawkins that he would go to Jacobs [Hawkins' ex-wife] first and give her an opportunity to cooperate before the Government indicted her or had her arrested.

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5. The prosecutor testtified at the new trial hearing that Hawkins bargained for an agreement that his wife would not be prosecuted as part of the deal for his cooperation. He also testified that this was not agreed to, but, as initially related by the prosecutor, "the agreement included the promise that we would go to his wife first, and give her the opportunity to cooperate before we indicted her or had her arrested. If she didn't take advantage of that opportunity, we were going to make every effort to have her picked up." N.T. Tr. 102.

Later on, the prosecutor testified that he didn't think "it was really part of the deal" with Hawkins. But he did give Hawkins this "assurance" respecting Ms. Jacobs. N.T. Tr. 103.

As the court of appeals implicitly acknowledges in its opinion, the important point on the *Brady* disclosure issue is whether Hawkins had a "subjective belief" that the "assurances" he was given regarding his wife were part of his agreement with the government. See Pet. App. A-8, *citing United States v. Onori*, 535 F.2d 938, 945 (5th Cir. 1978).

The Solicitor General blatantly misstates the claim in our Petition as concerning "immunity from prosecution for [the witness'] wife, Karen Jacobs." (Br. in Opp. 11). On this basis, the Solicitor General invokes the "two court" rule and urges that certiorari be denied because no such immunity was promised.

We did not argue here that the prosecutor promised immunity for Jacobs. We argued only that he did not disclose that he had promised to give her an opportunity to cooperate before indicting her — a proposition which was not contested and which the district court explicitly found. The reason that this was rejected as a basis for a new trial by the court of appeals was "that the disclosure of this information would not have produced a different result at trial," since "the jury was informed that Hawkins was testifying pursuant to his plea-bargain agreement with the Government, and receiving favorable treatment in exchange for his testimony . . ." Pet. App. A-8-A-9.

This Court has recognized the importance of full disclosure to defendants of all terms of plea arrangements with government witnesses. *See Giglio v. United States*, 405 U.S. 150 (1972). Due Process requires disclosure of the whole agreement. *See, e.g., United States v. Bigeleisen*, 625 F.2d 203, 208 (8th Cir. 1970). And the right of the defense counsel to cross-examine the witness "is not curtailed by the absence of explicit government promises of leniency, for the defense may attempt to show government conduct which might have led a witness to believe that his prospects for lenient treatment by the government depended on the degree of cooperation." *See United States v. Iverson*, 637 F.2d 799, 804 n.16 (D.C. Cir. 1981), *quoting United States v. Leonard*, 494 F.2d 955, 963 (D.C. Cir. 1974); *United States v. McCrane*, 547 F.2d 204, 206 (3d Cir. 1976).

Hawkins bargained for a bald promise for a relative who took the Fifth Amendment in a grand jury, and who,

he knew, was certainly at risk. He received a lesser procedural "assurance" for her which was adequate to protect her in any event, so long as *his* testimony was sufficiently strong to convict petitioner, thereby eliminating any government need for her cooperation. The very tentativeness of the arrangement with respect to Karen Jacobs strengthened the prosecutor's hold over Hawkins. As observed in *Boone v. Paderick*, 541 F.2d 447, 451 (4th Cir. 1976):

> [R]ather than weakening the significance for credibility purposes of an agreement of favorable treatment, tentativeness may increase its relevancy. This is because a promise to recommend leniency (without assurance of it) may be interpreted by the promisee as contingent upon the quality of the evidence produced — the more uncertain the agreement, the greater the incentive to make the testimony pleasing to the promisor.

The prosecutor's "assurance" to Hawkins respecting the witness' former wife gave him effective emotional control over the witness. Petitioner had a constitutional right to confront Hawkins with that fact in the jury's presence. *See Davis v. Alaska*, 415 U.S. 308, 318 (1974). But the fact was never disclosed to petitioner's counsel. *See* Pet. 9.

3. Exculpatory Statements Contradicting A Trial Witness' Incriminating Testimony.

The Solicitor General asserts that our Petition is "factually wrong" in describing a statement, not disclosed before or during trial, made to the FBI by Charles Katko contradicting Hawkins' trial testimony. Br. in Opp. 12. There is no factual dispute, however, regarding the contents of Katko's undisclosed statement, which is in the record as Defendant's New Trial Exhibit No. 3. Katko told government agents that Hawkins had leased a truck

for $2,000 for the purpose of hauling hay. This conflicted with Hawkins' trial testimony that he paid Katko $15,000 to lease trucks to be used in the conspiracy.

Two issues are presented on this matter by our Petition: (1) What is the standard for disclosure under *Brady* of statements which are useful for impeachment? (2) What is the validity, after *Bagley*, of a "clearly erroneous" or "abuse of discretion" standard of appellate review?

The thrust of the dispositions below was to avoid all issues raised here relating to Mr. Hawkins by insisting that Hawkins was, in any event, "thoroughly impeached." *E.g.*, District Court opinion, Pet. App. A-30-A-31; *id.* A-28. But Hawkins was the key witness offering direct testimony against petitioner, in an otherwise circumstantial case. After *Bagley* the lower court should be directed to reassess, by a standard less deferential than "abuse of discretion" or "clearly erroneous," whether the withholding of impeachment evidence could be immaterial on the theory that the government's major witness was already "thoroughly impeached."

The constitutional rights implemented by decisions such as *Brady* and *Napue* can be eviscerated if prosecutors are permitted to trivialize their violations of these rights by invoking appellate review standards framed in terms of "abuse of discretion" and "clearly erroneous." The *Bagley* decision demonstrates this Court's resolve to implement the prosecutor's obligation to disclose exculpatory evidence by demanding that such claims be scrutinized by a discerning judicial eye. The decision below — issued before *Bagley* was decided — should be reversed in light of *Bagley*.

CONCLUSION

For the foregoing reasons and those stated in our Petition, certiorari should be granted. The judgment below may be vacated and the case remanded for reconsideration in light of *United States v. Bagley,* 105 S.Ct. 3375 (1985).

Respectfully submitted,

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